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Supreme Court U.S.
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No. 98-1303

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELLEN R. KLEIN,

Petitioner,

vs.

DAVID COURTWRIGHT, individually, and DAN SCHAFER, individually, and as past and present chairpersons of the Department of History, Philosophy and Religious Studies of the College of Arts and Science of the University of North Florida,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court should have an interest in the present state of academic freedom.

II. Whether the United States Court of Appeals for the Eleventh Circuit made the correct decision when they affirmed the lower court's decision.

III. Whether the United States District Court for the Middle District of Florida made the correct decision granting the defendant's motion to dismiss:

A. By presupposing, without trial, that the plaintiff's actions were merely the "childish act(s) of a disgruntled employee", as opposed to public concern when she:

1. Wrote Feminism Under Fire.
2. Posted a state notice.
3. Defended a colleague's equal opportunity rights.

B. By making the incorrect judgment, without trial, that the plaintiff did not deserve tenure, regardless of her speech.

IV. Whether the United States District Court for the Middle District of Florida made the correct decision in granting the defendant's motion to dismiss on the grounds of qualified immunity.

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APPENDIX

Appendix A — Order And Opinion Of The United States District Court For The Middle District Of Florida Dated October 23, 1997 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated, Filed And Entered November 19, 1998 ..... 13a

Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished, but is reprinted in App. B at 13a.

The order and opinion of the United States District Court for the Middle District of Florida is published and reported at 1997 WL 793318 (M.D. Fla.). It is reprinted in App. A at 1a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was dated, filed and entered on November 19, 1998. App. B at 13a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

A. Background of the 1998 Judgment

Dr. Ellen R. Klein was employed at the University of North Florida (hereinafter "UNF") as a tenure-track assistant professor of philosophy from 1991-1997. The evidence of Klein's excellence in all three areas required for tenure — teaching, scholarship and service is overwhelming, yet she was denied tenure and promotion.

While employed at UNF, Klein expressed her opposition to the accreditation of a course entitled "Germany Today," which was essentially a culture course about post-World War II Germany. Specifically, she opposed teaching a culture course as philosophy. [R5-75-33, lines 20-25]. Dr. Klein was concerned about the integrity of the Department and the public's perception thereof. [R5-75-41, lines 15-22]. Her concerns were confirmed when the Florida Department of Education announced on September 27, 1994 that "Germany Today" could not in good conscience be accredited as a philosophy course. [R1-16-NN]. Dr. Klein posted the State's decision on her office door in order to make students and the general public aware of the ruling. She was reprimanded for this posting.

On November 15, 1994, Dr. Klein was assigned the task of keeping the minutes during a Department meeting to discuss the hiring of Dr. David Fenner for a position with the Department. [R5-75-32, lines 14-15]. During the meeting, Dr. Klein heard and wrote down (verbatim) comments made by the faculty that she considered to be racially derogatory toward Fenner. [R5-75-25, line 25]. The minutes were then handed out to all of the members of the Department for review [R5-70-110, lines 10-25] and were accepted *de facto*. The only handwritten comments returned to Dr. Klein at the time the

minutes were first disseminated were annotated by Dr. Dale Clifford who made only minor grammatical corrections. [R3-45-1; R3-55-1]. Concerned about the comments made by various Department members, however, Klein took a copy of the minutes (already approved by Clifford) to Thomas Mongar, who at the time was the president of the United Faculty of Florida (a teacher's union) and was assigned the job of protecting faculty rights. [R5-75-26, lines 3-7]. Klein gave a copy of the minutes to Professor Mongar. [R5-75-26, line 3]. Klein's report of the comments made by the faculty were eventually acquired by Dr. Ling and Dr. Galloway, the provost and associate provost (as well as the number two and three persons directly below Adam Herbert, the president of the University), and also to Dr. Radonovich, the dean of the College of Arts and Sciences. [R5-70-118, lines 8-16]. The minutes were so racially inflammatory as to prompt a high-level meeting between Ling, Galloway, Radonovich and Courtwright. [R5-70-118, lines 8-16]. Professor Fenner was hired as a result of that meeting. [R5-70-116, line 10].

In 1996, Dr. Klein, while still an employee of UNF, published a book, *Feminism Under Fire*, in which she criticized the feminist movement in American education. [R5-75-6, lines 11-21]. In the book, however, Dr. Klein also criticized the Department as a proponent of "misguided" feminist philosophy. [R5-75-6, line 18 and R5-75-7, lines 5-11]. Dr. Courtwright disagreed with some of Klein's contentions contained in the book and made his disagreements known when Klein's tenure was at issue. [R1-16-Y4 ¶ 2].

For years prior to these events, Klein received consistently excellent evaluations from her Department. Shortly afterward, however, she was denied tenure and promotion on the ostensive grounds that she was not an excellent teacher.

B. The Proceedings Below

Marking the line between speech protected by the First Amendment and speech which the state may legitimately regulate presents a question of law. *See New York Times v. Sullivan*, 376 U.S. 254, 285, 84 S. Ct. 710, 728-29, 11 L. Ed. 2d 686, 709 (1964). Courts must "make an independent examination of the whole record" to ensure that no "forbidden intrusion on the field of free expression" has occurred. *Sullivan*, 376 U.S. 254, 285 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S. Ct. 680, 683, 9 L. Ed. 2d 697, 702 (1963)). Thus, where an employee claims that government employment decisions were made in retaliation for the exercise of First Amendment rights, the appellant court conducts a *de novo* review on the question of whether the First Amendment protects the employee's conduct. *Connick v. Myers*, 461 U.S. 138, 148 n.7, 103 S. Ct. 1684, 1690 n.7, 75 L. Ed. 2d 708, 720 n.7 (1983); *Goffer v. Marbury*, 956 F.2d 1045, 1049 (11th Cir. 1992).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE FIRST AMENDMENT AND THE SPIRIT OF ACADEMIC FREEDOM IT IS SUPPOSED TO PROTECT.

On April 16, 1963 Dr. Martin Luther King, Jr. wrote a letter from the Birmingham Jail. The essence of the speech involved freedom, justice, and equality. Not surprisingly, Dr. King cited Socrates — the patron saint of the societal gadfly — as evidence that it is often those whom society calls "the troublemaker" that establish the tensions needed to "rise from the bondage of myths and half-truths to the unfettered realm of creative analysis

and objective appraisal." (King, 1963). Unfortunately, such "gadflies" as Socrates and King were given society's greatest punishment for their commitment to the freedoms of thought and speech.

Such freedoms, at least in our nation are supposedly hallowed in academia under the rubric of "academic freedom," and ultimately protected under the law vi the First Amendment. But even a cursory look at the contemporary academic climate shows that such freedoms are increasingly being marginalized. Furthermore, this Court's recent precedents show that the historically intimate connection between academic freedom and the First Amendment (Van Alstyne) has become dangerously strained under the pressures of employment law and the attorneys who abuse it.

From *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Perry v. Sinderman*, 408 U.S. 593 (1972) to *Connick v. Myers*, 461 U.S. 138, 148 n.7, 103 S. Ct. 1684, 1690 n.7, 75 L. Ed. 2d 708, 720 n.7 (1983), recent history demonstrates a sea change in the very character of the Court. Professors and teachers, particularly (and ironically) those in state institutions, are, in fact, losing more and more of their academic freedoms. And despite protestations to the contrary that such a loss "is no defeat for the First Amendment" (Brennan opinion in *Connick*), one must ask why there is now such a conspicuous lack of cases in which employees of such institutions have been given favorable judgments? I offer the lack of support from this Court as the *prima facie* reason this writ ought to be taken seriously.

More importantly, if cases like mine continually get a handwaving from the courts, academic institutions will continue to strengthen their grip on the throats of the gadflies. And when all such voices from our universities and colleges — environments which are created to nurture free thinkers and

bold speakers — are strangled into silence for fear of punishment, who in this great nation will have the courage to speak up against injustice?

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ACTED INCONSISTENTLY WITH ITS OWN PRIOR RULINGS (UNDER 11TH CIR. R. 36-1), THE RULING OF THE SECOND CIRCUIT, THE EIGHTH CIRCUIT AND THE RULINGS OF THIS COURT WHEN IT MADE A DECISION TO AFFIRM WITHOUT OPINION.

A. The judgment of the district court was based on a finding of fact that was not clearly erroneous, unless the presupposition was made that nothing the appellant said was true. For example, if the minutes were accurate, and the Department members did make racial comments about Fenner, then this is clearly a case of protected speech. As a matter of law, the Supreme Court has specifically characterized the use of racial discrimination as "a matter inherently of public concern." *Connick v. Myers*, 461 U.S. 138, 148 n.8, 103 S. Ct. 1684, 75 L. Ed. 2d 708, 721 n.8 (1983); *Barnard v. Jackson County, Missouri*, 43 F.3d 1218 (8th Cir. 1995).

B. Summary judgment was not supported by the record because the court should not give summary judgment "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief." *Volberg v. Pataki*, 917 F. Supp. 909 (U.S. Dist. 1996); *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir.); *Ad-Hoc Comm. of Baruch Black and Hispanic Alumni Ass'n v. Bernard M. Baruch College*, 835 F.2d 980, 982 (2d Cir. 1987).

C. Furthermore, ordinarily the issue "of whether public employee's protected speech played a substantial role in his or her termination is an issue of fact to be resolved by jury." *Barnard v. Jackson County, Missouri*, 43 F.3d 1218 (8th Cir. 1995); especially since "Protections of 1st Amendment have special meaning when teachers are involved." *Pred v. Board of Public Instruction of Dade County, Florida*, 415 F.2d 851 (1969).

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW MADE BY THE UNITED STATES DISTRICT COURT (M.D. FLORIDA) IS INCONSISTENT WITH RULINGS MADE IN THE ELEVENTH CIRCUIT, TENTH CIRCUIT, FIFTH CIRCUIT AND THIS COURT.

A. With respect to the book *Feminism Under Fire*:

1. For the district court to claim that a published book is not a matter of public concern contradicts the Eleventh Circuit's decision in *Maples v. Martin*, 858 F.2d 1545, 1553 (11th Cir. 1988) which holds that speech is raised to the level of public concern if it affects the public's perception of the quality of education in a given academic setting. In the present case, Klein's negative opinions of feminism's effects on higher education in general and the Department in particular is clearly a matter of public concern. To try to argue that Klein's motives for writing the book is itself not a matter of public concern also contradicts the Eleventh Circuit's decision in *Kurtz v. Vickery*, 855 F.2d 723 (11th Cir. 1988) which states that "focusing solely on . . . the employee's motivation, does not fully reflect the Supreme Court's directive that the content, forms and context of the speech must also be considered." *Kurtz* at 727.

2. To claim that the content of Klein's book did not play a significant role in her adverse tenure decision simply shows a complete refusal to take the record seriously. (*See* Reply Brief for Appellant, pp. 15-17.)

B. With respect to the posting of the State of Florida's notice that "Germany Today" was not a legitimate philosophy course, the district court's decision is inconsistent with the rulings of the Fifth Circuit which states that "refusal to allow college teacher to voice and apply in his teaching academic views relevant to assignments actually given him constitutes violation of teacher's First Amendment rights." (*Kaprelian v. Texas Woman's University*, 509 F.2d 133 (5th Cir. 1975).

C. With respect to the Fenner issue, Klein whistleblew on the members of the Department who made racist comments — the Tenth Circuit has determined that "speech that seeks to expose or question the integrity of government officials clearly concerns vital public interests." *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1988); *Gardetto v. Mason*, 100 F.3d 803 (10th Cir. 1996).

IV.

THE PETITION SHOULD BE GRANTED BECAUSE BOTH THE FOURTH AND EIGHTH CIRCUIT'S OPINION CONFLICTS WITH THE ELEVENTH CIRCUIT REGARDING THE QUESTION OF QUALIFIED IMMUNITY. FURTHERMORE, THE QUALIFIED IMMUNITY DEFENSE IS MOOT WITH RESPECT TO INJUNCTIVE RELIEF.

A. With respect to the question of Klein's speech exposing racial discrimination the Fourth Circuit argues that the immediate supervisor in question

> was not entitled to qualified immunity on African-American deputy sheriff's free speech claim, since any reasonable official in sheriff's position would have realized that he would violate the Constitution if he fired the deputy sheriff for speaking of widely held concerns about racial discrimination in sheriff's department.

Cromer v. Brown, 88 F.3d 1315 (4th Cir. 1996).

B. With respect to the question of Klein's posting of the Florida State notice on her office door, the Eighth Circuit argues that

> even if history department display case at state university was nonpublic forum . . . suppression was unreasonable since forum was designated for type of expression engaged in by professors and students, and suppression amounted to viewpoint-based discrimination.

Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997).

C. Given that Klein wants injunctive relief, "Qualified Immunity is not a defense which is available to government employees or officials who are sued in their official capacities for prospective injunctive relief." (42 U.S.C.A. § 1983 — *Kentucky v. Graham*, 473 U.S. 159 (1985)).

CONCLUSION

Unfortunately in the name of justice Klein has had to petition this Court as a court of last resort. More importantly, however, Klein's case is hallmark in that it offers this Court a chance to begin the important process of reaffirming the academic gadfly as an essential member of a free society. For this fundamental reason the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA DATED OCTOBER 23, 1997

Ellen R. KLEIN, Plaintiff,

v.

David COURTWRIGHT, etc., et al., Defendants.

No. 96-850-Civ-J-20B.

United States District Court, M.D. Florida.

Oct. 23, 1997.

* * *

ORDER

SCHLESINGER, J.

Before the Court are the following motions:

(1) Defendants' Motion for a New Scheduling Order Setting Time for Submission of Summary Judgment Motions and other Matters (Doc. No. 56, filed July 30, 1997). Plaintiff filed a response on August 8, 1997, stating that she does not oppose an extension of time to file the motion for summary judgment, but does oppose a rescheduling of the pretrial and trial dates. See Doc. No. 60. This motion is GRANTED IN PART. The Court will accept Defendants' Motion for Summary Judgment as having been timely filed. There is no need, however, for the Court to reschedule the dates for the pretrial

conference and trial. Further, the pretrial conference scheduled for Friday, October 31, 1997 is hereby CANCELED.

(2) Defendant Herbert's Motion to Dismiss Plaintiff's Amended Complaint (Doc. No. 61, filed August 25, 1997). Plaintiff filed a response in opposition on September 16, 1997. See Doc. No. 66. For the reasons discussed below, this motion is GRANTED.

(3) Defendants' Motion for Summary Judgment (Doc. No. 62, filed September 12, 1997). Plaintiff filed her response in opposition on September 25, 1997. See Doc. No. 67. For the reasons discussed below, this motion is also GRANTED.

(4) Defendants' Motion to Strike Portions of "Plaintiff's Opposition to Defendants' Motion for Summary Judgment," or in the Alternative, For Leave to File a Reply Memorandum (Doc. No. 76, filed October 6, 1997). Plaintiff filed a response in opposition on October 14, 1997. Defendants' Motion to Strike is DENIED.

In its order denying Defendant Courtwright and Schafer's Motion to Dismiss, the Court upheld the Magistrate's general stay of discovery, but allowed discovery on the sole issue of whether the Defendants are entitled to qualified immunity. See Order (Doc. No. 12, filed April 18, 1997). Discovery of this type has been concluded, and the Defendants have filed a motion for summary judgment. In addition to arguing that they are entitled to qualified immunity, the Defendants argue that they are entitled to judgment as a matter of law because the speech for which Plaintiff was allegedly retaliated against is not of a public concern. The Court agrees, and therefore Defendants are entitled to judgment as a matter of law.

Appendix A

DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir.1991). When a moving party has discharged its burden, the nonmoving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the nonmovant, Key West Harbor v. City of Key West, 987 F.2d 723, 726 (11th Cir.1993), and resolve all reasonable doubts in that party's favor, Spence v. Zimmerman, 873 F.2d 256, 257 (11th Cir.1989).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. Augusta Iron and Steel Works v. Employers Insurance of Wausau, 835 F.2d 855, 856 (11th Cir.1988). It must be emphasized that the

mere existence of some alleged factual dispute will not defeat an otherwise properly supported summary judgement motion. Rather, "the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

As the Court has previously stated, in order for Plaintiff, a public employee, to establish that her First Amendment rights have been violated by her employer, she must first demonstrate that the content of her expression is of a public concern. Bryson v. City of Waycross, 888 F.2d 1562, 1565 (11th Cir.1989).[1] This issue is one for the Court to decide. Id. The Court has twice considered the issue of whether Plaintiff's speech constitutes a matter of public concern. The Court first considered Plaintiff's speech in the Order addressing Defendants' Motion to Dismiss.

> . . . Plaintiff alleges that she was denied promotion and tenure because of the following speech:

---

1. She must then demonstrate that protecting the speech in question is more important than protecting the interests of the state in promoting the efficiency of the public services it performs through its employees, that her speech played a substantial part in the employer's decision to discharge her, and that she would have been discharged even had she not engaged in the protected speech. Bryson, 888 F.2d at 1565; see also Harris v. Shelby County Bd. of Ed., 99 F.3d 1078, 1086 (11th Cir.1996).

> (1) vocally supporting "a current instructor at the University who had received his doctor of philosophy from the same university from which Klein graduated, the University of Miami, and who shared certain of her beliefs concerning the discipline of philosophy.";
>
> (2) reporting to the appropriate entities of racial prejudice by faculty members of the Department in its selection of faculty;
>
> (3) opposing the inclusion of a course entitled "Germany Today," publishing unauthorized minutes of a faculty meeting which reported racially prejudicial comments, publishing the State of Florida's decision not to approve the class, and publishing the written reprimand she received for publishing the State of Florida's decision; and
>
> (4) publishing a book entitled "Feminism Under Fire," criticizing a particular trend in the discipline of philosophy and criticizing its proponents.

Order (Doc. No. 12).

The Court specifically found that Plaintiff's Complaint was "neither sufficiently clear nor detailed so as to enable the Court to make a decision as to whether the particular speech identified above involves a matter of public or private concern." See Williams v. Alabama State University, 102 F.3d 1179, 1183 (11th Cir.1997) (to determine whether Defendants are entitled to qualified immunity, the Court must determine whether it is clearly established law that particular speech is matter of public

concern). Thereafter, the Court denied Defendants' motion to dismiss without prejudice to the right of the parties to file motions for summary judgment on the issue of qualified immunity.

Plaintiff subsequently filed her motion for a preliminary injunction. In the Order denying this motion, the Court noted that "on Defendants' motion to dismiss, the Court could not look outside the Complaint to determine whether Plaintiff's alleged speech concerned matters of public concern." See Order (Doc. No. 41, filed June 26, 1997). The Court stated, however, that after having "reviewed the voluminous submissions in support and in opposition to Plaintiff's motion for preliminary injunction . . . the Court believes that it can make a determination as to whether Plaintiff has a substantial likelihood of success on the merits." The Court went on to discuss the content of Plaintiff's speech:

> The Court first notes that it has not changed its view with respect to Plaintiff's vocal support for the professor who went to her alma matter: this "speech" appears to be little more than a matter of private concern. Additionally, the Court can say with some confidence that whether the course Germany Today is taught as part of the philosophy department at the University of North Florida is not a matter of public concern.
>
> * * *
>
> Given the repeated conflicts between Plaintiff and the other members of her Department, the Court cannot say that the transcribing of the minutes the

> way that she did and the subsequent posting of the minutes was the courageous act of a "whistle-blower" citizen as opposed to a childish act by an extremely disgruntled employee. And to the extent that it is the latter, the speech is not a matter of public concern.

* * *

Upon further consideration of the Plaintiff's speech and the context in which it was made, and under the applicable legal standard requiring the Court to determine whether her speech concerns the public, the Court concludes that it does not.

The Eleventh Circuit has stated that the court must look to the content, form, and context of the employee's speech in deciding whether an employee's speech addresses a matter of public concern. Bryson, 888 F.2d at 1565. Another district court in this Circuit has recently summarized the law as follows:

> Courts "consider whether the speech at issue was made primarily in the employee's role as citizen, or primarily in the role of employee." Morgan v. Ford, 6 F.3d 750 (11th Cir.1993), cert. denied, 512 U.S. 1221, 114 S.Ct. 2708, 129 L.Ed.2d 836 (1994). The "First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." Connick v. Myers, 461 U.S. 138, 149, 103 S.Ct. 1684, 1691, 75 L.Ed.2d 708 (1983). In the Eleventh Circuit, a "public employee may not transform a personal grievance into a matter of public concern by invoking a

> supposed popular interest in the way public institutions are run." Ferrara, 781 F.2d at 1516. Instead, to rise to a level of public concern, statements must be directed "beyond the scope of internal management." Kurtz v. Vickrey, 855 F.2d 723 (11th Cir.1988). In the context of an educational setting, "speech that concerns internal administration of the educational system and personal grievances will not receive constitutional protection." Maples v. Martin, 858 F.2d 1546, 1552 (11th Cir.1988). A teacher's speech is a matter of public concern when it "directly affects the public's perception of the quality of education in a given academic system." Id. at 1553.

Boyett v. Troy State University at Montgomery, 971 F.Supp. 1403, 1415 (M.D.Ala.1997).

In the present case, Plaintiff's vocal support for Professor David Fenner — a personal friend — falls directly within the realm of personal grievance that should not be elevated to a matter of public concern simply because Plaintiff claims that faculty members made discriminatory comments while discussing his candidacy. As stated in Morgan v. Ford, 6 F.3d 750, 754-55 (11th Cir.1993), cert. denied, 512 U.S. 1221, 114 S.Ct. 2708, 129 L.Ed.2d 836 (1994), "the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment." Plaintiff's complaint centered around her private matters, not social interests.

Similarly, the Court views Plaintiff's publishing of the unauthorized minutes of a faculty meeting as an attempt to turn

a personal grievance into a public issue; but this attempt must ultimately fail. The publication was limited to the University of North Florida. See Kurtz v. Vickrey, 855 F.2d 723, 727 (11th Cir.1988).

The Court must also conclude that whether the Course "Germany Today" is taught as part of the Philosophy Department is not a matter that would "directly affect[ ] the public's perception of the quality of education" at the University of North Florida. In fact, Plaintiff's speech on this issue appears without question to represent speech made by a Philosophy professor who feels strongly about the Philosophy Department's courses, rather than by a concerned citizen. See, e.g., Williams v. Alabama State University, 979 F.Supp. 1406, 1997 WL 627075 at *6 (M.D.Ala. Sept.23, 1997) (finding that speech regarding textbook was entirely consistent with Plaintiff's role as employee).[2]

Finally, the speech found in Chapter 7 of Plaintiff's book "Feminism Under Fire" is not the type of speech protected by the First Amendment because it, too, does not concern a matter of the public. Quite the contrary, this chapter sets out in detail Plaintiff's personal account of her dealings with her Department. As accurately stated by the Defendants, "Plaintiff has used her book . . . as a vehicle to promote her purely private interests and to air her personal grievances." Defendants'

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2. The Court rejects Plaintiff's argument that course certification in the present case is a matter of public concern because review takes place at four levels at the University and Tallahassee. The Court cannot consider the speech outside of the context in which it was made. Thus, the Court need not conclude that speech concerning course certification might never be a matter of public concern, but does conclude that Plaintiff's speech was made by an employee Professor concerned with a lack of voice in her department.

Appendix A

Memorandum in Support of Law in Support of Defendants' Motion for Summary Judgment (Doc. No. 63, filed September 12, 1997) at p. 16. Accordingly, Plaintiff's claims must fail.[3]

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3. As to those sections of Chapter 7 which focus less on Plaintiff's personal grievances and more on feminism in general, the Court still does not believe that this speech rises to the level of public concern. The Court finds that Plaintiff's discussion of feminism in this chapter is directed to members of the academy and does not focus on issues of social interest that go beyond the academic setting. Thus, while her book was indeed published, and while the Court will even assume that the intended audience is the public, the Court concludes that the public is not concerned with the definition of teaching philosophy feministly and with Plaintiff's critique of teaching feministly. Perhaps the final paragraphs of this chapter demonstrate best that Plaintiff's speech, though at times sounding universal, is truly focused on Plaintiff's own personal agenda:

> In conclusion, my own experiences with feminists in academe has not been particularly fulfilling. As a woman I liken their sisterhood to a bad sorority — one has to look and think like they do to be accepted. As a philosopher, the situation is worse. Where feminists are in power — specific universities or editorial boards — my work and accomplishments have been systematically ignored.
>
> I realize that these women have worked hard for a voice; and I do not begrudge them this. But now that they have power, it's time to use it to help all women.
>
> If feminists in the academy want to do more than just feather their own nests, they should listen to all women, even those who sing a distant song. There is one thing worse than not having a voice at all and that is having one that no one listens to.

Feminism Under Fire (Exhibit to Plaintiff's Motion for Preliminary Injunction) at pp. 223-24.

Appendix A

The Court must emphasize again that it holds the First Amendment in the highest regard; however, not all speech receives constitutional protection. Even accepting Plaintiff's claims as true and deciding that Plaintiff was treated unfairly would not give the Plaintiff redress in this Court. Accordingly, Defendants are entitled to Judgment as a matter of law.

Additionally, Defendant Herbert's Motion to Dismiss is GRANTED. The Court gave Plaintiff leave to amend her Complaint for the purpose of adding Defendant President of UNF, Adam Herbert ("Herbert"), as a necessary party. In her Amended Complaint, Plaintiff asserts jurisdiction over Herbert solely under the All Writs Act. See Amended Complaint (Doc. No. 31, filed May 30, 1997) at ¶ 1. As argued by the Defendant, this Court previously questioned whether Plaintiff could use the All Writs Act as a basis for jurisdiction against Defendants Schafer and Courtwright. See Order (Doc. No. 12) and Order (Doc. No. 41). Plaintiff has not demonstrated that the All Writs Act is a proper basis for jurisdiction against Herbert.[4]

Even were the Court to grant Plaintiff leave to file her second Amended Complaint to properly assert jurisdiction, the Court notes that its ruling above on Defendant Schafer and Courtwright's Motion for Summary Judgment would eliminate Plaintiff's ability to obtain the relief she seeks in this action against all three of the Defendants.[5]

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4. Plaintiff has arguably also asserted general federal jurisdiction against Herbert. See Amended Complaint at ¶ 2 (citing 28 U.S.C. section 1331). However, Plaintiff cannot bring her suit directly under the First Amendment.

5. Notwithstanding Plaintiff's contention that Herbert is not a "person" under section 1983, the Court sees no jurisdictional impediment

(Cont'd)

Appendix A

Accordingly, the above-styled action is hereby DISMISSED. The Clerk shall enter judgment in favor of Defendants Schafer and Courtwright and against the Plaintiff, and shall close the file.[6]

(Cont'd)
to an action against Herbert in his official capacity under section 1983 for the sole purpose of obtaining prospective injunctive relief. See Lassiter v. Alabama A & M University, 28 F.3d 1146, 1152 n. 9 (11th Cir.1994) (adopting conclusions reached by the panel in Lassiter II); Lassiter II, 3 F.3d 1482, 1485 (11th Cir.1993) (section 1983 claim against University President in his official capacity, seeking prospective relief of reinstatement, was not barred by the Eleventh Amendment). However, because Plaintiff did not assert jurisdiction against Herbert under section 1983, and because allowing Plaintiff to amend her Complaint for a second time would be ineffectual in light of the Court granting Defendants' motion for summary judgment, the Court finds that Defendant's Motion to Dismiss must be granted.

6. Further, the Court agrees with Defendants Courtwright and Schafer that — had the case not been dismissed — they would have been protected in their individual capacity from claims brought under 42 U.S.C. section 1983 by the doctrine of qualified immunity because "their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known" Gold v. City of Miami, 121 F.3d 1442, 1445 (11th Cir.1997).

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED, FILED AND ENTERED NOVEMBER 19, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-3442
Non-Argument Calendar

D. C. Docket No. 96-850-CIV-J-20B

ELLEN R. KLEIN,

Plaintiff-Appellant,

versus

DAVID COURTWRIGHT, etc., et al,

Defendant-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(November 19, 1998)

Before ANDERSON, BARKETT, and MARCUS, Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(Cont'd)

Appendix B

"Costs taxed against the plaintiff-appellant."

Entered: November 19, 1998
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: DEC 18 1998

(Cont'd)

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.